UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DARWIN PEABODY,	:	
	:	**Case No. 1:05-CV-17678**
Plaintiff,	:	
	:	**JUDGE O'MALLEY**
v.	:	
	:	**MEMORANDUM AND ORDER**
LINCOLN ELECTRIC CO., et al.,	:	
	:	
Defendants	:	

This action was originally scheduled for trial on August 15, 2006. On June 15, 2006, for reasons then stated on the record, the Court vacated the trial date and indicated the trial would be rescheduled during the "winter time slot" – after the trial of the "*Duke Power* case," which is scheduled to begin October 30, 2006.[1]

That evening, however, the Court learned informally that defendants had discovered certain information suggesting plaintiff Peabody had been less than fully forthcoming about his medical history during discovery. The Court immediately recognized that this new information might lead to a decision

[1] *See Solis* trial tr. at 2757-59 (June 15, 2006) ("So what I'm going to do is keep *Peabody* on track for a *Daubert* analysis. We will have to figure out when that will be . . . . * * * But I'm going to move *Peabody* to the wintertime slot, and we will have to work with everybody's schedules to decide when in February or early March would be the best time for that trial.")

by plaintiffs not to pursue the *Peabody* case to trial.[2] On June 19, 2006, the Court received formal notification of Peabody's discovery failures: defendants filed a motion to re-open discovery, asserting that both Peabody and his family had "repeatedly deceived defendants" by failing to disclose, in response to direct questioning, that Peabody had obtained treatment at a drug and alcohol rehabilitation facility. Defendants asked, among other things, to be allowed to redepose all of Peabody's witnesses.

In response, plaintiffs' counsel presented an overview of this entire MDL and noted that the parties' original intent was to: (1) try three "bellwether" cases where plaintiffs had clear movement disorders; and then (2) try a fourth case where the plaintiff allegedly suffered only a "subclinical" neuropsychiatric injury, without any obvious physical injury.[3] Plaintiffs observe that this intention has not been fulfilled, as *Peabody* was originally chosen as the fourth case (Peabody suffers only an alleged neuropsychiatric injury, not a clear movement disorder), but there has been only one bellwether trial to date. Thus, plaintiffs' counsel ask that, rather than reopen discovery and reschedule the *Peabody* case for the winter time slot, plaintiffs should instead be allowed to designate a different bellwether plaintiff (one

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[2] As the Court stated at the time:

> This has to do with last night's discussion of the discovery issues and my moving of the *Peabody* trial [date].
>
> I found out after the court day that there were some complications, let's say, as it relates to Mr. Peabody and his case. I was not aware of that. I was aware there were discovery disputes that had to do with both sides arguably identifying witnesses late and a few other issues, but I was not aware of all the many complications that apparently have arisen.
>
> That's not why I moved *Peabody*. I moved *Peabody* for the reason I said. But the reason I mention this is, obviously, I'm not going to waste valuable Court time in August on a long *Daubert* hearing if that case may ultimately not go to trial. So we're going to have to make some determinations about that case before I expend that time.

Solis trial tr. at 2770 (June 16, 2006).

[3] *See Solis v. Lincoln Elec. Co.*, case no. 04-CV-17363, docket no. 14 at 2-5 (Feb. 1, 2006) (recounting the parties' bellwether trial concept negotiations).

with a clear movement disorder) for the winter time slot, and to postpone the *Peabody* trial indefinitely.

In reply, defendants object to any indefinite postponement of the *Peabody* trial. Rather, defendants ask the Court to either: (1) reopen discovery as requested, and set *Peabody* down for trial after the *Duke Power* case; or (2) insist that *Peabody* be dismissed with prejudice. Further, to prevent the defendants from repeatedly having to incur substantial litigation expense only to see the case dismissed shortly before trial, defendants ask the Court to issue a prospective order, ruling that plaintiffs will be required to pay defendants' fees and costs for any future trial candidates if the plaintiff decides not to pursue his claims after defendants have begun affirmative discovery.

The Court agrees that an indefinite postponement of the *Peabody* trial is not reasonable. Rather, plaintiffs must make the following choice and so inform the Court within 14 days of the date of this Order: (1) move to dismiss *Peabody* with prejudice; or (2) resume preparation for trial of the *Peabody* case, to take place in early 2007.[4]

As to the prospective order requested by defendants, the Court does recognize that defendants have now been forced twice to incur substantial trial-preparation costs, only to have the plaintiff seek to avoid an adjudication after discovery was virtually complete.[5] Still, the Court concludes that the Order requested by the defendants is not appropriate, for two reasons. First, it appears that plaintiffs' counsel were equally surprised to learn of their own clients' misrepresentations, despite counsel's own expenditures of substantial resources in investigating the *Peabody* case and preparing it for trial. Second, an Order that would require reimbursement of fees and costs *any* time a plaintiff decides not to pursue his claims after

[4] Further, if plaintiffs' counsel chooses the latter alternative, the Court will grant, in at least some measure, the motion to reopen discovery.

[5] In addition to Peabody, the plaintiff in the second bellwether case – Dewey Morgan – successfully moved to dismiss his case shortly before trial.

defendants have begun any form of "affirmative" discovery is too aggressive a change in the parties' normal obligations. While the Court agrees that some steps must be taken to avoid similar circumstances in the future and that, at some point, sanctions in the form of cost shifting might be appropriately imposed on a plaintiff and/or his counsel, defendants' current proposal goes too far. Instead, in a future Order, the Court will impose case management obligations designed to avoid unnecessary cost or prejudice to defendants, by minimizing similar surprise revelations deep in the discovery process.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: July 31, 2006